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IN THE

Supreme Court of the United States

October Term, 1959

No. .....

AFFILIATED MUSIC ENTERPRISES, INC.,
Petitioner,

AGAINST

SESAC, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1959

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AFFILIATED MUSIC ENTERPRISES, INC.,

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SESAC, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, which unanimously affirmed a judgment of the Federal District Court, Southern District of New York dismissing plaintiff's complaint on the merits, in an action for treble damages and for injunctive relief, for violations of the anti-trust laws of the United States.

Opinions Below

The opinion of the Court of Appeals is appended. The opinion of the District Court (reported in 160 F. Supp. 865), is printed in the Joint Appendix (pp. 11a-35a) certified to this Court by Court of Appeals, and submitted herewith.

Jurisdiction

The judgment of the Court of Appeals was entered June 8, 1959. Jurisdiction of this Court is involved under 28 U. S. C., Sec. 1254 (1).

The Court of first instance obtained jurisdiction under 15 U. S. C. 15, 22, 26 and 28 U. S. C. 1337.

Questions Presented

1. In an action to recover treble damages and for injunctive relief, under Sections 4 and 16 of the Clayton Act, for violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, in conducting business involving interstate commerce, through agreements providing for the pooling of copyrights and sharing of revenues, derived from joint exploitation of the pooled copyrights, may plaintiff obtain relief, upon proof of damage, or is plaintiff required to prove, in addition, that defendant had "monopoly power" over price, or to exclude competition?

2. Does a finding that defendant controls 20 to 30 per cent of the "relevant market" warrant the conclusion that such control does not constitute an appreciable part of the "relevant market"?

3. Where defendant operates under a pooling and sharing arrangement in the acquisition of performance rights to "Gospel Music" with other copyright owners, and controls 20% to 30% of the market and plaintiff seeks to acquire performance rights on a non-pooling basis, does defendant's arrangements operate to restrain plaintiff's competition so as to entitle plaintiff to injunctive relief and resulting damage?

4. Assuming that plaintiff had no facilities to engage in business as a performance rights organization, but sought to acquire performance rights to "Gospel Music", and to exploit same by sublicensing to B.M.I., one of three performance rights organizations in the United States; that vigorous competition existed between the three performance rights organizations and that defendant controlling 20 per cent to 30 per cent of the market, exerted effort, resulting in the cancellation of plaintiff's acquisitions to some 30,000 copyrights formerly part of defendant's repertory, which reverted to defendant, does plaintiff's motives to transfer its performance rights to B.M.I. constitute a violation of the anti-trust laws, depriving it of obtaining relief against defendant for its violations of the anti-trust laws?

Statutes Involved

Sherman Anti-Trust Act, Sections 1 and 2, 15 U. S. C. 1, 2:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or

engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monoplize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Anti-Trust Act, Sections 3, 4 and relevant part of 16, 15 U. S. C. 14, 15:

"Section 3

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract, for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or

competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

"Section 4

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

"Section 16

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * *."

Statement of the Case

Plaintiff charges defendant with conducting its business in violation of the anti-trust laws in that it has acquired a monopoly over performance rights to "Gospel Music" by illegal arrangements with copyright owners of such music, permitting it to fix prices and impose onerous conditions and restrictions in the purchase, licensing or acquisition of such "rights"; that it restrains competition between copyright owners of such music; that it has pre-

yented plaintiff from competing with defendant in the purchase and marketing of such performance rights to "Gospel Music"; more specifically, that it has coerced and induced 14 publishers and owners of copyrights to such music to cancel existing agreements with plaintiff and has prevented others from negotiating with plaintiff for the acquisition of such performance rights, all for the purpose of destroying plaintiff as a competitor in the field and industry which defendant dominates, by reason of which plaintiff has suffered damages (pp. 64a-57a).*

The case was tried before District Judge Sylvester Ryan. By stipulation the issue of liability, only, was tried and issue of damages reserved for proof, if defendant's liability is determined (p. 318a).

The District Court found that:

Defendant's business operations constitute a *monopoly per se*, in that the uniform affiliation agreement with all of its publishers, from whom it acquires its performance rights, is the classic pooling of rights and sharing of revenue, arrangement, repeatedly struck down, as violative of Section 1 of the Sherman Act (p. 30a).

Defendant exerts monopolistic power against users, mainly Radio and Television broadcasters to whom it issues only blanket licenses upon an annual license fee fixed by defendant, without regard to their needs; that it refuses to identify its copyrights to prospective users (pp. 17a-18a).

Performance rights, are controlled and licensed for public performance, for profit, by three performance rights organizations in the United States of which defendant

*References are to pages of Joint Appendix certified by the Court of Appeals.

Sesac is the third largest organization (p. 14a). These activities constitute interstate commerce (pp. 14a-15a).

Defendant's Repertory consists of 180,000 copyrights of various types of music ranging from classical to country hillbilly, religious and secular, but 30% to 40%, or 40,000 to 50,000, are "Gospel Music" copyrights (p. 15a).

The commerce involved is licensing performance rights (p. 26a). The relevant market is performance rights in Gospel Music. It is separate and distinct from any other music market (p. 28a); defendant has the largest number of Gospel music affiliates who own 40,000 to 50,000 copyrights which gives defendant a 20% to 30% control of the Gospel music market (145a).

Plaintiff was successful in August and September, 1954, in acquiring 15 publishers of "Gospel Music" whereby plaintiff received assignments of performance rights to the copyrights owned by said 15 publishers (pp. 22a-23a). *Defendant*, upon receiving notice of such assignments to plaintiff, began to counteract plaintiff's success in acquiring "Gospel" performance rights. Special employees were selected to call on the publishers who had signed with plaintiff, to win them back (p. 25a). They were told that they had given away their property without compensation, that additional revenues would be forthcoming without any necessity of sharing with plaintiff; that plaintiff was not equipped to represent them; that plaintiff's intervention would adversely affect their interests; and that they should not have signed without first notifying defendant. Upon request, these publishers were given a form of cancellation to be sent to plaintiff. Fourteen of said fifteen publishers thereupon cancelled their contracts with plaintiff (p. 26a).

Defendant does not control an "appreciable part" of the relevant market, since a spot-check survey of Gospel

Music catalogues of recordings submitted by the defendant, indicates that defendant controls from 20% to 30% of Gospel Music performance rights; that by its market position (20% to 30% control) defendant did not have the power to regulate prices and exclude competition in violation of Section 2 (p. 30a).

Plaintiff was seeking to free the publishers from defendant's grip in order to place them within its own grip, or to replace B.M.I. for defendant, and was "blowing hot and cold" with illegality (p. 32a).

Implicit in the Trial Court's findings, is that defendant's conduct resulted in cancellation of plaintiff's 14 contracts and thereby lessening plaintiff's competition against defendant (25a-26a).

The Court of Appeals held, that plaintiff's charge of anti-trust violations against defendant must fall, for there was a complete absence of proof that defendant has the power to fix prices or exclude competition because defendant and B.M.I., two of the three giant performance rights organizations in the United States have a background of fierce competition (pp. 19-20, *ante*).

Reasons for Granting Writ

The Court of Appeal's decision, involving Federal questions relating to private enforcement of the anti-trust laws, is in conflict with all of the applicable decisions of this Court.

The Court of Appeals has so far departed from the accepted and usual course of judicial construction of the anti-trust laws, especially related to copyright monopoly,

and has sanctioned such departure by the District Court, as to call for an exercise of this Court's power of supervision.

Argument

A. The holding that plaintiff may not have relief for damages or for an injunction, because there was no showing of "monopoly power" though defendant's business operations in pooling copyrights and sharing revenues, was a *per se* violation of Section 1 of the Sherman Act (a restraint of trade affecting 20 per cent to 30 percent of the relevant market), is in conflict with the latest pronouncement of this Court in the case of *Klor's Inc.* v. *Broadway-Hale's Stores*, 359 U. S. 207, where this Court held, that Section 2 of the Sherman Act was intended to strike down as illegal, all attempts to reach the end prohibited by Section 1. Therefore, a finding of an existing violation of Section 1 obviates the need for a finding of existence of "monopoly power".

In *Klor's Inc., supra*, a boycott of a small retailer, by a group having no "monopoly power", or domination over the "relevant market", was considered, as a matter of law, to be monopolistic as interfering with the natural flow of commerce, even though such boycott affected only a small amount of business, having no impact on the economy involved.

B. Defendant's control of 20 to 30 per cent of the total market does not, as a matter of law, constitute an absence of "monopoly power", as the lower courts held, since the "appreciable" test relates to the extent of power and practice in obstructing or eliminating free trade and not to quantity control of the total market.

Ruddy Brooks Clothes v. *British & Foreign Marine Insurance Company*, 195 Fed. 2d, 86, 89, cert. den., 344 U. S. 816;

U. S. v. *Yellow Cab Co.*, 332 U. S. 218, 225, 67 S. Ct. 1560;

Associated Press v. *U. S.*, 326 U. S. 1, 65 S. Ct. 1416;

Addyson Pipe & Steel Co. v. *U. S.*, 175 U. S. 211, 237, 20 S. Ct. 96;

Apex Hosiery Co. v. *Leader*, 310 U. S. 469, 485, 60 S. Ct. 982;

Forgett v. *Scharf*, 181 Fed. 2d, 754, 757, cert. denied, 346 U. S. 285;

Fashion Originators Guild v. *Fed. Trade Commission*, 114 Fed. 2d, 80 aff'd 312 U. S. 457, 465-8, 61 S. Ct. 703;

U. S. v. *National City Lines*, 186 Fed. 2d, 562, 568, cert. denied, 341 U. S. 916.

C. Since defendant's acts prevented plaintiff from retaining and marketing some 30,000 "Gospel Music" copyrights (pp. 25a-26a) in a total market found by the Trial Court to consist of approximately 100,000 copyrights, defendant's conduct constitutes a *per se* violation of Section 2 of the Sherman Act as well, for, conduct aimed at eliminating competition or resulting in the lessening or destroying of competition are distinct offences under Section 2 of the Sherman Act, apart from "monopoly power", as a result.

U. S. v. *Socony Vacuum Oil*, 310 U. S. 150, 225 (note 59), 60 S. Ct. 811;
U. S. v. *Griffith*, 334 U. S. 100, 107, 68 S. Ct. 941;
U. S. v. *United Shoe Mach. Corp.*, 110 Fed. Supp. 295, 297, aff'd 347 U. S. 521, 74 S. Ct. 669;
American Tobacco Co. v. *U. S.*, 328 U. S. 781, 813-14, 66 S. Ct. 1125;
U. S. v. *Aluminum Co. of America*, 148 F. (2d) 416.

D. The holding of the lower courts here, that proof of violations of Sections 1 and 2 must concur, as a prerequisite to the right of recovery, is repugnant to the clear pronouncement of Section 4 of the Clayton Act, providing that recovery may be had "by reason of anything forbidden in the anti-trust laws".

Chattanooga v. *Atlanta*, 203 U. S. 390, 27 S. Ct. 65;
Montague v. *Lowry*, 193 U. S. 38, 24 S. Ct. 307;
Loewe v. *Lawlor*, 208 U. S. 274, 28 S. Ct. 301;
Package Closure Corp. v. *Seabright*, 141 Fed. (2d) 972, 977-8;
Kobe v. *Dempsey Pump Co.*, 198 Fed. 2d 416.

E. The Court of Appeals and the District Court decisions at bar have the effect of foreclosing independents or middle-men from competing with the three giant performance rights organizations for the acquisition of performance rights to "Gospel Music" and to confine the market to the three performance rights organizations, since the determination here is, that defendant is incapable of excluding plaintiff's competition, because there exists vigorous competition between the giants in the industry (pp. 19-20, *ante*). Assuming there exists vigorous competition between the three giants in the industry, it does not follow

that one of the three giants may not use its power to exclude others from entering the field. The findings of the District Judge are, that plaintiff was prevented from competing with defendant (pp. 25a-26a).

Defendant unlawfully pools 20 to 30 per cent of the copyrights in the market involved which in itself gives it "monopoly power" to restrict competition of unaffiliated copyright owners in violation of the copyright and anti-trust laws.

In the words of District Judge Ryan, condemning defendant's pooling arrangement: "1) it makes it possible for one copyright owner to set the price and share in the revenue derived from another's copyright thus adding to the monopoly of the copyright; 2) it cuts off competition among the affiliated copyright owners to market and exploit their works since they agree on a fixed price and share in the common profits; and 3) it tends to make the affiliated group too effective in resisting competition from unaffiliated copyright owners. A 'copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses.' *U. S.* v. *Paramount*, 334 U. S. 131, 144; *U. S.* v. *Line Material Co.*, 333 U. S. 287" (p. 30a).

The holding of the lower Courts, that the pooling arrangements do not operate to restrain plaintiff's competition, is inconsistent with the economic principles underlying the anti-trust laws and is in direct conflict with the holding of this Court in *U. S.* v. *Paramount*, 334 U. S. 131, 144; *U. S.* v. *Line Material Co.*, 333 U. S. 287, followed in *Alden Rochelle* v. *ASCAP*, 80 F. Supp. 888 and *Witmark* v. *Jensen*, 80 F. Supp. 843.

Denial of injunctive relief, restraining defendant from pooling copyrights and sharing revenues constitutes a

negation of the plain provisions and intendment of the anti-trust laws and a marked departure from the usual course of construction of the laws by this Court.

F. The District Court and the Court of Appeals held that plaintiff was "seeking to free the publishers from defendant's grip in order to place them within its own grip • • •. • • • until such time as defendant could be replaced by B.M.I. as it was in the case of Stamp Baxter Company. A perfect situation of a plaintiff 'blowing hot or cold with illegality'" (p. 32a).

The District Court said:

> "It is not a question of 'unclean hands' for if plaintiff had been a victim of defendant's unlawful practices the fact that it also had been guilty of illegal conduct would not immunize defendant against liability. • • • Here it is more than that—for plaintiff's theory is a frank confession that but for defendant's alleged stranglehold on the gospel music market, it believes that it would have succeeded in supplanting defendant as a monopolist. To permit recovery would be to have this Court place 'its imprimatur on a scheme which involves • • • a violation of the anti-trust laws'. Mercoid Morton Salt Co. v. Suppiger Co., 314 U. S. 488" (p. 33a).

Plaintiff's contracts and practices in acquiring performance rights, did not involve a pooling arrangement. Its efforts to accumulate a number of copyrights were not violative of the provisions or the spirit of the anti-trust laws. *Alden Rochelle, Inc.* v. *ASCAP*, 80 Fed. Supp. 888, 889. The lower Court's conclusion, that plaintiff's motives of acquiring and transferring its copyrights to B.M.I., con-

stituted an illegal motive "involving a violation of the anti-trust laws", is in conflict with the very authorities cited by the District Court in support of this holding.

The District Court cites *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670; and *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, in support of its conclusion.

In the *Mercoid* case, this Court held that plaintiff, suing for an infringement, could not succeed since the proof indicated that it used its patent monopoly so as to secure a monopoly upon an unpatented device. However, it specifically held that defendant, who was found to have been guilty of contributory infringement, could not be estopped from prosecuting a counterclaim against the plaintiff for damages under Section 4 of the Clayton Act for a violation of the monopoly laws, which is in accord with other authoritative pronouncements dealing with the doctrine of "unclean hands".

The *Morton Salt* case, applied the general principle that courts, especially courts of equity, withhold their aid, when plaintiff is using the right asserted, contrary to public interest.

What is there against public interest, in plaintiff's efforts to acquire performance rights to Gospel Music, under a plan which would wrest some or all of the publishers from an affiliation condemned as being in restraint of trade, and throw the performance rights into a market which affords reasonable elements of competition?

The District Court cites *Kiefer-Stewart Co.* v. *Seagram Sons*, 340 U. S. 211, and *Trubuhs Realty* v. *News Syndicate*, 107 F. S. 595, as authorities for the proposition, that defendant cannot immunize itself against liability by showing that plaintiff is in court with "unclean hands"; that the aim of the court is to vindicate the public policy

underlying the anti-trust laws, and is not particularly concerned with the private morals of the suitors. Yet, it based its denial of relief to plaintiff on inferences of immoral associations with Hill & Range and B.M.I., which at worst, would seem to involve unclean hands.

CONCLUSION

For all of the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

Opinion of United States Court of Appeals for the Second Circuit

No. 245—October Term, 1958.

(Argued April 14, 1959. Decided June 8, 1959.)

Docket No. 25148

AFFILIATED MUSIC ENTERPRISES, INC.,
Plaintiff-Appellant and Appellee,

—v.—

SESAC, INC.,
Defendant-Appellee and Appellant.

Before:

CLARK, *Chief Judge,* and
SWAN and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge.*

Affiliated Music Enterprises, Inc., and Sesac, Inc., each appeal from a decision, D. C. S. D. N. Y., 160 F. Supp 865, dismissing the former's claim for treble damages and in-

junctive relief for violations of the antitrust laws and the latter's counterclaim for unfair competition. Affirmed.

IRVING LEMOV, New York City (Michael Halperin and A. Halsey Cowan, of Halperin, Morris, Granett & Cowan, New York City, on the brief), *for plaintiff-appellant and appellee.*

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CLARK, *Chief Judge*:

In the court below Affiliated Music Enterprises, Inc., charged defendant, Sesac, Inc., with violations of §§1 and 2 of the Sherman Act and §3 of the Clayton Act, 15 U. S. C. §§1, 2, 14, and Sesac charged AME with several instances of unfair competition. From Judge Ryan's decision, D. C. S. D. N. Y., 160 F. Supp. 865, dismissing the claims of each against the other, both parties appeal.

Sesac is a family corporation owned and controlled by Paul and Ruth Heinecke. It is one of three major licensing organizations for music performance rights in this country. The others, each larger than Sesac, are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI). These companies acquire exclusive performance rights to copyrighted music from owners of copyrights, police infringements of these rights, and license others to perform the music. In the case of Sesac, at least, these licenses are sold principally to radio and television broadcasters; and it generally offers them only blanket or conglomerate licenses authoriz-

ing the performance of all works it controls. The copyright owners are paid royalties out of these licensing proceeds computed on a rather complex allocation system.

AME, the plaintiff below, was organized in 1953; it sought to enter the performing rights field by acquiring rights which it intended to exploit not by direct licensing to users as do Sesac, ASCAP, and BMI, but by exclusive licensing to one of these three organizations. Half its stock is owned by Jean and Julian Aberbach, and the remainder by Kurt A. Jadassohn. The Aberbach brothers are the owners of Hill & Range Songs, Inc., a large music publisher; and Jadassohn is a former officer of Sesac.

While with Sesac, Jadassohn initiated an extensive campaign of acquiring performance rights to "gospel music." This is a type of music which is apparently quite popular in the South and in rural areas throughout the country. It is characterized by lyrics dealing with spiritual and religious subjects in a personal, homely vein sung to distinctly secular rhythms and tunes. By 1953 Sesac held rights of more than a score of gospel music publishers under contracts terminable at ten-year intervals. Many of these publishers had personally dealt only with Jadassohn in their business relations with Sesac. In AME's sole effort to break into the performing rights industry Jadassohn canvassed a number of them, and on promises of increasing their royalties and various representations about Sesac's financial condition he succeeded in acquiring blanket assignments of performing rights from fifteen of seventeen publishers he solicited. In fact, the publishers would soon have received increased royalties in any event, since, as Jadassohn knew, Sesac had just negotiated a license agreement with the television industry, which had theretofore been carried along gratis by all three performing rights organizations. When word reached defendant of

AME's activities it, too, sent representatives into the field. Ultimately, after a meeting between representatives of the publishers, Jadassohn, and a Sesac representative, all but one of the fifteen who had signed with AME elected to cancel those contracts and remain with Sesac.

In the court below and on this appeal plaintiff's principal contention is that Sesac monopolized the market for the acquisition of rights for the performance of gospel music and purposely drove AME out of the industry to maintain its position of monopoly and to restrain competition in that market in violation of §§1 and 2 of the Sherman Act, 15 U. S. C. §§1, 2. It also charges that Sesac's pooling of its performance rights and its practice of granting broadcasters only conglomerate licenses covering all rights it owns are prohibited by the Sherman and Clayton Acts, 15 U. S. C. §§1, 14.

Far from showing a restraint of trade or a monopolization, however, the evidence adduced below reveals only a noteworthy competitive struggle between two giants in the performing rights industry. Judge Ryan found that AME was but the alter ego of the Aberbach brothers' substantial publishing house Hill & Range Songs, Inc., which was in turn closely affiliated with BMI. This finding is amply supported by the evidence. AME was financed wholly by loans from Hill & Range and had only $100 of paid-in capital, while its office was a desk in the Hill & Range office. While soliciting performance rights for AME, Jadassohn also signed up publication rights for Hill & Range. Moreover, under the Hill & Range-BMI contract in force from 1949 to 1955, Hill & Range and the Aberbachs personally covenanted that all performance rights they might acquire would be assigned to BMI unless previously assigned to another performing rights organization. And BMI itself has financed this litigation.

Against this background of fierce competition between BMI and Sesac, AME's charges of antitrust violations must fall of their own weight. There is a complete absence of any showing that Sesac has that power over price or to exclude a competitor which is the essence of the violations charged. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 391; *United States* v. *Griffith*, 334 U. S. 100, 107; *United States* v. *United Shoe Machinery Corp.*, D. C. Mass., 110 F. Supp. 295, 297, 342, affirmed *United Shoe Machinery Corp.* v. *United States*, 347 U. S. 521. The temporary success of AME's raid on Sesac's publishers suggests that these publishers do not feel closely tied to defendant on a permanent basis; and Sesac's ultimate thwarting of AME's efforts was accomplished not by the force of its existing contracts or by economic coercion, but by fair and open salesmanship and an outbidding of plaintiff's offers to the publishers.

It is significant that AME was able to retain the largest of the publishers it initially signed up, despite the power it asserts defendant has; and it retained this publisher simply by offering it favorable terms, including a guarantee of the AME contract by the financially sound Hill & Range Songs, Inc., which it did not make available to the smaller firms.

The record below similarly lacks evidence even as to Sesac's position in the market that it is alleged to have monopolized. Judge Ryan's findings do seem to support the conclusion that performance rights in gospel music constitute the relevant market for purposes of this case. Thus he found the music distinct from other popular music, and without substitutes which will equally satisfy its devotees. But the popularity of the typical gospel tune is quite short-lived, and its performance rights of value only for a small portion of the copyright term. There is no evidence of the proportion of currently valuable perform-

ance rights Sesac owned at any time relevant to this litigation.

Moreover, Sesac's pooling of the performance rights assigned to it and its offering to broadcasters of only conglomerate licenses authorizing the performance of all works it controls, which AME attacks as *per se* violations of the Sherman and Clayton Acts, have, we feel, no relevance at all to this litigation. As Sesac's pool of performance rights includes all its acquisitions, of which rights to gospel music comprise only a small portion of the total, these practices do not by themselves tend to prove that Sesac has monopoly power in the field of gospel music. And AME has not suggested any manner in which they operated to its injury or otherwise restrained its competition with Sesac. Clearly they played no part in Sesac's successful winning back of the fourteen publishers AME temporarily acquired. AME's own proposal to the publishers was that it would affiliate them with the even bigger performance-rights pools of ASCAP or BMI. So far as we can see, they present no present hindrance to the acquisition or marketing of performance rights by AME. The validity of Sesac's pooling of performance rights and conglomerate licensing practices in the abstract and apart from their effect on AME is not before us; we express no opinion as to whether in a suit by the Government or some other private plaintiff they might be held lawful or unlawful.

Finally, we think the court below correctly dismissed Sesac's counterclaim for unfair competition. It was shown below that Jadassohn made use of his knowledge of Sesac's method of allocating royalties to publishers and of the names of those publishers. The trial judge also found that Poklitar, Jadassohn's successor at Sesac, kept AME informed of defendant's efforts to forestall the AME publisher raid. None of the information Jadassohn carried away with him, however, partakes of the nature of a trade

secret. The publisher's names are a matter of public record in the files of the copyright office; and as the 1950 consent decree against ASCAP indicates, a policy of effective competition favors broad knowledge throughout the industry of the terms and systems of allocation of royalties to publishers followed by the performance-rights organizations. *United States* v. *American Society of Composers, Authors and Publishers*, Civ. No. 13-95, D. C. S. D. N. Y., 1950-51 CCH Trade Cases ¶62,595, §XIII B. See Timberg, *The Antitrust Aspects of Merchandising Modern Music*, 19 Law & Contemp. Prob. 294, 311-315. Finally, Sesac has shown no damages from Poklitar's activities.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 245

AFFILIATED MUSIC ENTERPRISES, INC.,
Petitioner,

against

SESAC, INC.,
Respondent.

BRIEF OF RESPONDENT, SESAC, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

The Petitioner seeks a Writ of Certiorari addressed to the United States Court of Appeals for the Second Circuit to the end that the unanimous affirmance by that Court of the judgment of the United States District Court for the Southern District of New York dismissing Petitioner's complaint on the merits may be reviewed here.

The case was tried before the District Court (Ryan, J.) for ten days. The trial ended on March 15, 1957. Subsequently, exhaustive briefs were submitted to the

Court by both sides. Thereafter the District Court on January 30, 1959 filed an opinion dismissing the complaint with costs and also respondent's counterclaim. Petitioner and Respondent appealed from the judgments to the United States Court of Appeals for the Second Circuit which affirmed the judgments with a decision written by Chief Judge Clark on June 8, 1959, a copy of which is appended to the Petition filed herein. No petition for a rehearing was filed by either party. Respondent has not and does not intend to file a petition for a Writ of Certiorari.

Petitioner claims as reasons for granting the Writ that there is a conflict between the decisions of the Court of Appeals and the applicable decisions of this Court on questions relating to private enforcement of the anti-trust laws. It further claims that the Court of Appeals has so far departed and has permitted the District Court to so far depart from the accepted and usual course of judicial construction of the anti-trust laws as to call for an exercise of this Court's power of supervision.

As explained below, there is no merit in such contentions. None of the reasons set forth in Supreme Court Rule 19 is present in this case. The sole question presented to this Court is whether Petitioner sustained the burden of showing as a matter of fact that it "was injured in his business or property by reason of anything forbidden by the anti-trust laws. . . .". (15 U. S. C. Sec. 4) The District Court ruled on the facts that Petitioner did not meet this burden, and the Court of Appeals affirmed this ruling on the facts.

Thus, the United States District Court for the Southern District and the United States Court of Ap-

peals for the Second Circuit after an exhaustive review of the facts held that there was a complete absence of any showing that Petitioner was injured in its business by anything forbidden by the anti-trust laws. The Supreme Court of the United States has now been asked to be the third court to pass on that factual question.

The petition falls squarely within the frequently announced rule of this Court that "granting of the Writ would not be warranted merely to review the evidence or inferences drawn from it". *General Talking Pictures Company* v. *Electric Company* (1937) 304 U. S. 175 at page 178; *Southern Power Company* v. *N. C. Public Service Company* (1923) 263 U. S. 508.

Statement of the Case and Argument

The Petitioner, Affiliated Music Enterprises, Inc. (AME) charged the Respondent, Sesac, Inc. with violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U. S. C. A. §§ 1, 2 and 14.

As the District Court found and the Court of Appeals affirmed, Respondent Sesac is a family corporation owned and controlled by Paul and Ruth Heinecke (19a, p. 17).* It is one of three major licensing organizations for music performance rights in this country. The others, each larger than Sesac, are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI) (14a, p. 19).

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* The "a" references are to the Joint Appendix.

The "p" references are to the pages of the Opinion of the Court of Appeals annexed to the Petition.

These companies acquire exclusive performance rights to copyrighted music from owners of copyrights, police infringements of these rights, and license others to perform the music. In the case of Respondent Sesac, at least, these licenses are sold principally to radio and television broadcasters; and it generally offers them only blanket or conglomerate licenses authorizing the performance of all works it controls. The copyright owners are paid royalties out of these licensing proceeds computed on a rather complex allocation system (14-18a, p. 18).

Petitioner AME was organized in 1953; it sought to enter the performing rights field by acquiring rights which it intended to exploit not by direct licensing to users as do Respondent Sesac and ASCAP and BMI, but by exclusive licensing to one of these three organizations. Half its stock is owned by Jean and Julian Aberbach and the remainder by Kurt A. Jadassohn. The Aberbach brothers are the owners of Hill & Range Songs, Inc., a large music publisher; and Jadassohn is a former officer of Respondent Sesac (19-22a, p. 18).

Petitioner AME, as the District Court found (which finding was affirmed by the Court of Appeals (p. 19)), was the creature of BMI, one of Respondent's two competitors. BMI used Petitioner in its attempt to take over the "gospel music" publishers affiliated with Respondent (21-22a, 31-33a).

While with Respondent Sesac, Jadassohn initiated an extensive campaign of acquiring performance rights to "gospel music" (19a, pp. 18-19). This is a type of music which is popular in the South and in rural areas throughout the country. It is characterized by lyrics dealing with spiritual and religious subjects in a per-

sonal, homely vein sung to distinctly secular rhythms and tunes. By 1953, Respondent Sesac held rights of more than a score of gospel music publishers under contracts terminable at ten-year intervals. Many of these publishers had personally dealt only with Jadassohn in their business relations with Respondent Sesac (12-14a, 19a, p. 18).

The only rights Jadassohn sought to acquire for Petitioner AME under his agreement with the Aberbachs were those of publishers affiliated with Respondent Sesac. Specifically, in late August and September of 1954, he attempted by canvassing each of them to acquire for Petitioner AME the performance rights to the music of 17 of Respondent Sesac's affiliated publishers who specialized in "gospel music." As a result of Jadassohn's promises to increase their royalties and various false representations made by him about Sesac's financial condition, he succeeded in acquiring blanket assignments of performing rights from fifteen of the seventeen publishers he solicited. In fact, as the Court found, the publishers would soon have received increased royalties in any event, since, as Jadassohn knew, Sesac had just negotiated a license agreement with the television industry, which had theretofore been carried along gratis by all three performing rights organizations (22-26a, p. 18; 143a, 259a, 435a, 441a, 442a, 452a, 453a, 459a, 492a, 497a, 508a). When word reached defendant of Petitioner's activities, it, too, sent representatives into the field. Ultimately, after a meeting between representatives and attorneys for the publishers, Jadassohn and a Sesac representative, all but one of the fifteen who had signed with AME elected on the advice of their own attorney and without any pressure or coercion by Re-

spondent Sesac to cancel those contracts and remain with Sesac (25-26a, p. 18; 179a, 323-27a, 351-55a, 364-65a, 415a, 419a, 425-6a, 428-30a, 438a, 441a, 454a, 459a, 460a, 505a, 549a, 564a).

As the District Court found (30a), the facts proved, far from supporting Petitioner's contention that its loss of such contracts resulted from Respondent Sesac's alleged anti-trust violations, showed rather that Respondent Sesac was the winner in a competitive battle between it and its competitor BMI which prevented the latter from taking its "gospel music" publishers from it.

It was not a mistaken view of the law or a misapplication thereof on the part of the District Court or the Court of Appeals which led to the rejection of Petitioner's claim that Respondent was guilty of a violation of Section 2 of the Sherman Act. It was the proven facts which led the District Court to find that Sesac did not monopolize the market in gospel music, did not drive Petitioner out of the industry, and could not and did not exclude competition or control prices therein. As the Court of Appeals in affirming these findings said at pages 19-21:

> "Far from showing a restraint of trade or a monopolization, however, the evidence adduced below reveals only a noteworthy competitive struggle between two giants in the performing rights industry. Judge Ryan found that AME was but the alter ego of the Aberbach brothers' substantial publishing house Hill & Range Songs, Inc.; which was in turn closely affiliated with BMI. This finding is amply supported by the evidence. AME was financed wholly by loans from Hill & Range and had only $100 of paid-in

capital, while its office was a desk in the Hill & Range office. While soliciting performance rights for AME, Jadassohn also signed up publication rights for Hill & Range. Moreover, under the Hill & Range-BMI contract in force from 1949 to 1955, Hill & Range and the Aberbachs personally covenanted that all performance rights they might acquire would be assigned to BMI unless previously assigned to another performing rights organization. And BMI itself has financed this litigation.

"Against this background of fierce competition between BMI and Sesac, AME's charges of antitrust violations must fall of their own weight. There is a complete absence of any showing that Sesac has that power over price or to exclude a competitor which is the essence of the violations charged. . . . The temporary success of AME's raid on Sesac's publishers suggests that these publishers do not feel closely tied to defendant on a permanent basis; and Sesac's ultimate thwarting of AME's efforts was accomplished not by the force of its existing contracts or by economic coercion, but by fair and open salesmanship and an outbidding of plaintiff's offers to the publishers.

"It is significant that AME was able to retain the largest of the publishers it initially signed up, despite the power it asserts defendant has; and it retained this publisher simply by offering it favorable terms, including a guarantee of the AME contract by the financially sound Hill & Range Songs, Inc., which it did not make available to the smaller firms.

"The record below similarly lacks evidence even as to Sesac's position in the market that it is alleged to have monopolized. Judge Ryan's findings do seem to support the conclusion that per-

formance rights in gospel music constitute the relevant market for purposes of this case. Thus he found the music distinct from other popular music, and without substitutes which will equally satisfy its devotees. But the popularity of the typical gospel tune is quite shortlived, and its performance rights of value only for a small portion of the copyright term. There is no evidence of the proportion of currently valuable performance rights Sesac owned at any time relevant to this litigation."

So too the District Court found to be without merit Petitioner's charge that it suffered injury, because Sesac's pooling of its performance rights and alleged practices of granting broadcasters only conglomerate licenses covering all rights it owns allegedly violated Section 1 of the Sherman Act and Section 3 of the Clayton Act (31a).

As the District Court found (20-22a), which finding was affirmed by the Court of Appeals (p. 19), the Petitioner AME was organized for the purpose of securing for Respondent Sesac's competitor BMI the gospel music publishers affiliated with Sesac. The District Court said that "it would be naive to assume that any organization other than BMI would eventually succeed to defendant's (Respondent Sesac) assigned performance rights" (32a).

The District Court so concluded because the evidence shows and the Court so found that far from attempting to rescue the publishers, Petitioner was seeking to profit from their affiliation with Respondent Sesac until such time as Respondent Sesac could be replaced by its competitor BMI (21a, 23a, 99a, 150a, 167a, 295a,

632a). As the Court said, this was "A perfect situation of a plaintiff 'blowing hot or cold with illegality' " (32a). It further held that Petitioner AME's "theory is a blanket confession that but for Defendant's alleged stranglehold on the gospel music market it believes that it" (and eventually BMI) "would have succeeded in supplanting Defendant as a monopolist", and that to permit Petitioner to recover against Sesac "would be to have this Court place 'its imprimatur on a scheme which involves * * * a violation of the antitrust laws' " (31-33a).

The Court of Appeals in affirming the District Court finding that Petitioner was not injured by Sesac's alleged *per se* violation of the Sherman and Clayton Acts, found that such alleged violations in any event were entirely irrelevant to this litigation saying at page 21:

> "* * * Sesac's pooling of the performance rights assigned to it and its offering to broadcasters of only conglomerate licenses authorizing the performance of all works it controls, which AME attacks as *per se* violations of the Sherman and Clayton Acts, have, we feel, no relevance at all to this litigation. As Sesac's pool of performance rights includes all its acquisitions, of which rights to gospel music comprise only a small portion of the total, these practices do not by themselves tend to prove that Sesac has monopoly power in the field of gospel music. And AME has not suggested any manner in which they operated to its injury or otherwise restrained its competition with Sesac. Clearly they played no part in Sesac's successful winning back of the fourteen publishers AME temporarily acquired. AME's own proposal to the publishers was that it would affiliate them with

the even bigger performance-rights pools of ASCAP or BMI. So far as we can see, they present no present hindrance to the acquisition or marketing of performance rights by AME."

CONCLUSION

Neither the District Court nor the Court of Appeals misapprehended the applicable law, nor is the decision of the Court of Appeals in conflict with it. The District Court dismissed the Petitioner's complaint on the merits, and the Court of Appeals affirmed such dismissal for the reason that Petitioner failed to prove that it suffered any injury as a result of a violation by the Respondent of any of the provisions of the Sherman or the Clayton Act.

Accordingly, it is respectfully submitted that the petition be denied.

Respectfully submitted,

THOMAS F. DALY,
Attorney for Respondent.